No. 06-1692

In The

Supreme Court of the United States

PAUL KLEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

A. CAN A WARRANTLESS SEARCH BE UPHELD WHEN IT IS PERFORMED PURSUANT TO A CONDITION OF PROBATION WHICH WAS AN ILLEGAL AND VOID SENTENCE?

II.

PARTIES TO THE PROCEEDING

There are no parties to this proceeding other than those listed in the caption

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III.

OPINION BELOW

The unpublished Memorandum of United States Court of Appeals for the Ninth Circuit is entitled *United States v. Klein*, and is reproduced in Appendix (App.) A.

IV.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its decision on April 20, 2007. *See* App. A.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

V.

CONSTITUTIONAL PROVISION INVOLVED

This appeal involves the Fourth Amendment and the Due Process Clause of the United States Constitution.

VI.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Petitioner was charged by way of Indictment filed on May 25, 2004, with Possession of Machine Guns (Count One); Unlawful Possession of a Firearm Silencer (Count Two); Possession of a Non-Registered Firearm (Count Three); and Felon in Possession of a Firearm (Count Four). Petitioner ultimately pled guilty to Counts One and Four.

On August 25, 2004, Petitioner filed his Motion to Suppress Evidence. The government filed their Opposition on or about September 14, 2004. Petitioner filed his Reply on September 22, 2004. An evidentiary hearing was conducted on April 11, 2005.

At the conclusion of the evidentiary hearing the Honorable Magistrate Judge took the matter under advisement. Thereafter, on May 22, 2005, the Magistrate entered her Report and Recommendation denying the Motion to Suppress. Petitioner filed a timely Objection to the Report and Recommendation. The government filed their Opposition. On June 7, 2005, the District Court entered its Order Denying the Motion to Suppress Evidence.

Thereafter, the Petitioner entered his guilty plea and specifically reserved his right to appeal the denial of his Motion to Suppress. Petitioner was sentenced on December 19, 2005. Petitioner filed a timely Notice of Appeal. On April 20, 2007, the United States Court of Appeals for the Ninth Circuit filed its Memorandum decision affirming the District Court's ruling.

B. STATEMENT OF THE FACTS

On March 4, 2002, Petitioner herein, Paul Klein, was sentenced in the District Court for the Central District of California for possessing counterfeit currency. *United States v. Paul Richard Klein*, Central District of California case number 00-1181-WJR. At the time of his sentencing in California, Klein was forced to represent himself. He had previously been represented by counsel, William Dougherty of Villa Park, California. Mr. Dougherty died in December 2001. Klein was never appointed new counsel, even when brought into Court.

At the sentencing hearing, the district court imposed a sentence of four months in a home detention program followed by three years of supervised release. *See* App. B. The conditions of supervised release did not include a search condition. Following sentencing, no appeal was taken as Klein had waived his right to appeal.

Several months after the sentencing, the government approached Klein, who was still without counsel, about "correcting" his sentence. On May 3, 2002, Klein signed a stipulation prepared by the government. That stipulation was captioned: "Stipulation Re: Correction of Judgment and Probation/Commitment Order." *See* App. C.

The stipulation stated that Klein's sentence would be changed from one imposing a period of imprisonment followed by supervised release to a sentence of probation which included home detention as a condition of probation. The stipulation claimed that at Klein's sentencing on March 4, 2002, "the Court inadvertently stated that it sentenced defendant to three years 'supervised release' with four months of home detention, rather than stating that it sentenced defendant to three years probation with a special condition of four months of home detention." The order "correcting" the sentence was signed by the district court and filed on May 7, 2002. The order "correcting" the sentence did not alter any of the other conditions imposed as part of the previously ordered three-year period of supervised release.

Prior to Klein's illegal sentence being "corrected" he had already moved to Nevada.

When Klein met with his Nevada probation officer, Rusty Ellis, the probation officer noticed that Klein did not have a search condition among his conditions of probation.

The probation officer demanded that a search condition be added to Klein's conditions of probation. The probation officer demanded that Klein sign a waiver making a search of his residence and vehicle without a warrant a condition of his probation or the probation officer would force Klein to go to court where the condition would be imposed anyway. The probation officer said to Klein that he either sign the waiver "or I'll take you to court, make you sign it, and we'll be off on a bad foot, is that what you want?" Moreover, the officer stated that Klein's transfer to Nevada could be denied. Feeling threatened and coerced, Klein signed the waiver.

Klein's probation was fairly routine for the first year. Klein started and ran a business, Vegas Auto Sound. His probation officers did a number of "home visits" at Klein's residence without incident. Then in May, 2003, Joseph Perez became his probation officer.

On July 8, 2003, Perez, who was accompanied by a second probation officer, Todd Fredlund, conducted a home visit on Petitioner. At that time they saw a ceremonial sword in Klein's bedroom. Perez said he was going to seize the sword. Perez and Fredlund then began to search through several drawers in Klein's bedroom. This search eventually lead to the discovery of three firearms. Klein was placed under arrest. The next day, ATF agents obtained a search warrant for Klein's residence based entirely on the findings made by Perez and Fredlund the day before. When this warrant was executed several more weapons were located and seized.

The Indictment filed against Petitioner was based upon the weapons seized at his residence by Perez and Fredlund on July 8th and by ATF agents on July 9, 2003.

C. TESTIMONY AT SUPPRESSION HEARING

1. Dale Russell Ellis

Mr. Ellis is a probation officer in the District of Nevada. He was first assigned to supervise Petitioner in March of 2002. Petitioner had requested a transfer of his Probation from the Central District of California to Nevada. Petitioner was already residing in Nevada.

In April of 2002, Petitioner visited this probation officer at his office. They went over Petitioner's conditions of supervision. At that time the probation officer asked Petitioner to sign a waiver adding a search condition to his supervision. The officer testified that "We always request a search condition no matter who it is coming from whatever district coming here," . . . "In our district, we require a search condition." The officer had no specific memory of the conversation with Petitioner. The officer testified that if the individual signs the waiver it is sent over to the Judge who will include it as part of their special conditions. If the individual does not sign the waiver, then they will take the matter to Court and request that a search condition be added. The other option, when the individual refuses to sign, is denial of the transfer from California to Nevada. The Officer testified that in the past, refusal to sign the authorization to search has resulted in the denial of transfer from other districts.

This officer recognized that the court order from the Central District of California did not contain a search clause. He further recognized that the Honorable Judge Rae, who was familiar with Petitioner's case, had evaluated the appropriate sentence for Petitioner. The Honorable Judge Rae explicitly left out a clause permitting warrantless searches of Petitioner.

On April 4, 2002, the day that Petitioner signed the waiver, the officer admitted that he *did not ask Petitioner if he wanted to consult with a lawyer prior to signing the waiver*. The officer further testified that although he did not have a specific recollection of the events in question, it is quite possible that he informed Petitioner that he would not be permitted to remain in Nevada if he did not have a search clause. The Officer testified that Petitioner was anxious to remain in Nevada, as he had a business, with employees, that was operating in Nevada.

The officer testified that he did not explain to Petitioner the process of a 32.1 hearing; however, he admitted that the statute requires a hearing with the assistance of counsel prior to making this type of change in Petitioner's conditions of release.

This officer testified that Petitioner's supervision was formally transferred to Nevada at a point in time after the search clause was added as a condition of supervision by the Nevada Court.

It should be further noted that the Waiver was signed on April 4, 2002, and Klein's sentence was "corrected" on May 7, 2002. Accordingly, the search clause was added as a condition of the illegal sentence of supervised release. Furthermore, this additional condition was added prior to the District Court in the Central District of California "correcting" the judgment. The "corrected" judgment did not adopt the search clause.

2. Joseph Perez

This witness was Petitioner's Probation Officer on July 8, 2003. On July 8, 2003, he met with Petitioner at

his residence. He was accompanied by Officer Fredlund. The officers entered Petitioner's home. This officer advised Petitioner that he "needed a tour" of the residence.

As this officer entered Petitioner's room he saw a sword against the wall between the bed and the night-stand. The officer advised Petitioner that he was not supposed to have any dangerous weapons. The officer secured the sword. The officer asked Petitioner to show him the closet. The officer did not discover anything improper within the closet. At that time the two officers and Mr. Klein were all standing within the bedroom. Officer Perez asked Petitioner if he had any other weapons, to which Petitioner did not respond. Although Klein made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms." The dresser had several drawers; however, only one was opened at that time. The drawer was approximately four feet away from Petitioner. The officer described the drawer as a "junk drawer." This officer testified that officer Fredlund then opened a drawer to the dresser that was directly by him. Again, that dresser had several drawers and only one was opened at that time. That officer found a loaded gun magazine.

The officer escorted Klein out of the room while officer Fredlund watched Klein. This officer then went back into the bedroom and "conducted a limited search of the area." Petitioner was not in the bedroom at that time. The officer found three different weapons. The weapons were located underneath the bed. Klein and his girlfriend were *then* placed in restraints.

3. Todd Fredlund

This witness is a probation officer, and he accompanied Officer Perez to Petitioner's home on July 8, 2003. Officer Perez wanted a walk through of the home and directed Petitioner to show them his bedroom. As soon as they made entry into the room the officer observed a sword situated between the bed and the nightstand.

Mr. Perez advised Petitioner that it was a dangerous weapon and inquired if there were any other weapons in the residence. Klein did not answer the question. Officer Perez then randomly opened a dresser drawer near where he was standing. The officer found a high capacity magazine with ammunition in the drawer. The drawer was approximately five feet away from Petitioner.

At that time the officers escorted Petitioner out of the bedroom. Officer Perez went back into the bedroom. Perez later came out of the bedroom and placed Petitioner in handcuffs. Perez then went back into the bedroom again.

4. Paul Klein

Mr. Klein testified that he started a business in Las Vegas called Vegas Auto Sound. The business license was obtained on September 11, 2001.

Prior to moving to Las Vegas, Mr. Klein was charged in the Central District of California with Money Laundering. Mr. Klein entered into a plea agreement with the United States and agreed to cooperate with their investigation. Mr. Klein did in fact cooperate with the government and received a 5K.1 departure. There were people prosecuted as a result of Mr. Klein's cooperation. Those people resided in California. Accordingly, after Mr. Klein's

sentence was imposed, it was his desire to leave California. Mr. Klein testified that the people that he assisted the government with prosecuting learned of his cooperation "almost immediately," and he then received death threats. Klein had an agreement with the prosecution and the Court that his supervised release would be transferred to Nevada. Accordingly, Mr. Klein moved to Nevada and began a business.

At the time of Mr. Klein's sentencing he did not have counsel. His attorney had passed away. The same is true when Mr. Klein met with his probation officer in Las Vegas in April of 2002. Paul met with Rusty Ellis and was asked to sign a waiver of search clause. Paul was told that the waiver was required if he wanted to move to Nevada. The officer advised Petitioner to "either sign it or I'll take you to court and make you sign it, and we'll be off on the bad foot, and you won't be allowed to be in Nevada. Is that what you want?" *Petitioner had no lawyer, was not offered the opportunity to contact a lawyer, nor was he offered a federal public defender.* Petitioner felt that he had no choice, but to sign the waiver. Petitioner testified that he attempted to write "signed under duress" on the form; however, the officer made him sign a fresh form.

D. THE NINTH CIRCUIT COURT OF APPEALS' OPINION

Klein raised a number of issues on appeal. The court denied all of Klein's issue pertaining to the illegal search that was executed in Klein's home. *See United States v. Klein*, App. A. Of moment to this appeal, is the split in the Circuits' view related to enforcement of conditions of an illegal sentence of supervised release. The United States

Court of Appeals for the Second Circuit has recognized that conditions of an illegal and void sentence of supervised release cannot be enforced. *United States v. Thomas*, 135 F.3d 873 (2nd Cir. 1998). The United States Court of Appeals for the Ninth Circuit upheld the search in this case which was performed as a result of Klein's illegal and void sentence. The Ninth Circuit relied upon the holding in *Custis v. United States*, 511 U.S. 485, 490-97 (1994) and *United States v. Martinez-Martinez*, 295 F.3d 1041, 1044 (9th Cir. 2002) and viewed Klein's motion as a collateral attack on his California conviction. Those two cases are both factually and legally distinguishable from this case. Those cases address the impropriety of collateral attacks on prior convictions that are being utilized for sentencing enhancements. To the contrary, the instant case deals with the fact that Klein's prior conviction could not be utilized as the basis or justification for the illegal and warrantless search performed by the government agents.

Petitioner is litigating the propriety of a search and not the propriety of his California conviction. Had the district court herein agreed that the search was a violation of the Fourth Amendment, because Appellant was not properly on supervision at the time of the search, the Court would not be entering an order invalidating Klein's prior conviction, it would be entering an order suppressing the evidence.

This Petition follows.

VII.

REASONS WHY THE WRIT SHOULD ISSUE

A. THIS HONORABLE COURT SHOULD GRANT THE WRIT IN ORDER TO CORRECT THE SPLIT IN THE CIRCUITS, VACATE THE NINTH CIRCUIT'S DECISION AND REMAND THE MATTER WITH INSTRUCTIONS THAT KLEIN'S PREVIOUSLY IMPOSED SENTENCE WAS ILLEGAL AND VOID AND THE EVIDENCE SEIZED AS A RESULT OF THAT SENTENCE BE SUPPRESSED

This Court should grant this Writ because there is a split in the circuits. The Second Circuit Court of Appeals in *U.S. v. Thomas*, 135 F.3d 873 (2nd Cir. 1998), ruled in favor of the defendant therein on the same issue. The United States Court of Appeals for the Ninth Circuit Court ruled against Petitioner herein. The decision in *United States v. Klein*, 06-10033 (9th Cir. 2007) is in conflict with the decision in *United Sates v. Thomas*, *supra*, and accordingly, this Honorable Court should address the inter-circuit conflict. *See* SUP. CT. RULE 10(a).

B. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN UPHOLDING THE WARRANTLESS SEARCH THAT WAS PERFORMED PURSUANT TO A CONDITION OF KLEIN'S ILLEGAL AND VOID SENTENCE

1. The District Court in the Central District of California Lacked Jurisdiction To "Correct" Klein's Sentence on May 7, 2002

The District Court for the Central District of California sentenced Klein on March 4, 2002. At that sentencing

hearing, the court imposed a sentence of home detention to be followed by three years of supervised release. On May 7, 2003, two months after the sentencing, the district court issued an order "correcting" that sentence. The court changed Klein's sentence from three years of supervised release to three years of probation.

The sentence of supervised release was in and of itself an illegal sentence. It is clear that supervised release can never be imposed without an initial period of imprisonment. *See* 18 U.S.C. § 3583(a) ("The court . . . may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release *after imprisonment*. . . .") (emphasis added); U.S.S.G. § 5D1.1 ("The court shall order a term of supervised release *to follow imprisonment* when a sentence of imprisonment of more than one year is imposed, or when required by statute," and "may order a term of supervised release *to follow imprisonment* in any other case.") (emphasis added). The plain language of § 3583(a) and U.S.S.G. § 5D1.1 compels the conclusion that supervised release presupposes a period of imprisonment. It follows that, for this reason too, the original sentence was in violation of law.

Additionally, the May 7, 2002, "correction" was also illegal. It is black letter law that the district court lacked jurisdiction to "correct" Klein's sentence on May 7, 2002, two months after he was sentenced.

Rule 35(a) provides the only means by which a district court can "correct" a sentence.[1] Rule 35(a) states that the court "within 7 days after sentencing, may correct a

[1] Rule 36 provides that a court may correct "clerical mistakes" at any time. At issue here is not a "clerical mistake."

sentence that resulted from arithmetical, technical, or other clear error."[2] Rule 35 is jurisdictional. "The district court must correct a sentence within seven days after orally pronouncing it *or else it loses its jurisdiction to modify the sentence*." *United States v. Penna*, 319 F.3d 509, 512 (9th Cir. 2003) (emphasis in original), citing *United States v. Aguirre*, 214 F.3d 1122, 1123 (9th Cir. 2000). *See also United States v. Wisch*, 275 F.3d 620, 626 (7th Cir. 2001): "The time limit is jurisdictional, *United States v. Vega*, 241 F.3d 910, 911-912 (7th Cir. 2001), and furthermore, the motion must be *ruled on* by the district court within seven days, not simply *filed with* the clerk of the court during that time." (Emphasis in original.) *Penna* makes it absolutely clear that where a court without jurisdiction illegally "corrects" a sentence, the "corrected sentence" is null and void. *See also United States v. Thomas, supra.*

Since no search condition was ever made a condition of Klein's supervised release by the Court, and since Klein's sentence and "corrected" sentence were illegal, the warrantless search conducted by Perez and Fredlund on July 8, 2003 was unlawful.

Additionally, assuming arguendo that the "correction" to Klein's sentence was valid, the search clause that was added by Officer Ellis in April of 2002, was not adopted by the United States District Court for the Central District when it "corrected" Klein's Judgment in May of 2002. Accordingly, there was never a valid search clause and all

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[2] The same language was substantially set forth in Rule 35(c) prior to December 1, 2002 when Rule 35 was amended.

evidence seized by Perez and Fredlund must be suppressed.

This exact issue was addressed by the United States Court of Appeals for the Second Circuit in *U.S. v. Thomas*, 135 F.3d 873 (2nd Cir. 1998). Therein, the defendant was sentenced to a period of home detention to be followed by supervised release. Thereafter, the Court modified the sentence to be a period of probation with the home confinement as a condition of said probation. *Id.* at 874. The defendant ultimately violated the conditions of her "probation" and was sentenced to nine months of community confinement. *Id.* The defendant appealed and the United States Court of Appeals for the Second Circuit held that district court's modifications were not permissible under Federal Rules of Criminal Procedure 35(c) and 36, as the district court corrected the sentence from a non-clerical error beyond the seven day time limitation. *Id.* at 875. The Court held that the amended sentence was "imposed in violation of law." *Id.* at 876. Finally, the Court concluded that there could be no violation of probation that was illegally imposed by the void sentence. *Id.*

The same is true for Petitioner herein. Petitioner was neither on supervised release nor probation at the time of the warrantless search, and therefore the evidence seized should have been suppressed, since the probation officers had no authority to search.

2. Inter-Circuit Conflict

In deciding that the evidence seized at Petitioner's home was admissible evidence, the United States Court of Appeals for the Ninth Circuit Court has created a divergence in federal criminal jurisprudence.

VIII.

CONCLUSION

The Petitioner's home was illegally searched as a result of a void and illegal sentence. Had Petitioner's case been pending within the United States Court of Appeals for the Second Circuit, the evidence would have been suppressed. Accordingly, there is a split in the circuits and Certiorari is warranted herein.

Dated this 15 day of June, 2007.

Respectfully submitted,

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APPENDIX A

2007 WL 1171542

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, V. PAUL KLEIN, Defendant-Appellant.	No. 06-10033 D.C. No. CR-04-00208-RLH MEMORANDUM* (Filed Apr. 20, 2007)

Appeal from the United States District Court
for the District of Nevada
Roger L. Hunt, District Judge, Presiding

Argued and Submitted April 12, 2007
Pasadena, California

Before: B. FLETCHER, McKEOWN, and BYBEE, Circuit Judges.

Appellant Paul Klein ("Appellant") appeals the district court's decision denying his motion to suppress evidence obtained as the result of a warrantless search of his house. The facts and procedural history are familiar to the parties, and we do not repeat them here. Appellant challenges the district court's suppression ruling on two grounds.

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

First, Appellant argues that the search of his home violated the Fourth Amendment because it was conducted without a warrant. We review such claims de novo, and we also review the district court's "[f]actual findings . . . for clear error." *United States v. Manning*, 56 F.3d 1188, 1196 (9th Cir. 1995). Applying that standard, we hold that the search of Appellant's home did not run afoul of the Fourth Amendment because, as a condition of his probation, Appellant was subject to a valid warrantless search condition that permitted probation officers to search his home and the probation officers who conducted the search did so based on a "reasonable suspicion that . . . [Appellant] [was] engaged in criminal activity." *United States v. Knights*, 534 U.S. 112, 121 (2001).[1] The probation officers had reasonable suspicion that Appellant was violating the terms of his probation because they saw a sword in plain view next to his bed, and Appellant was prohibited from possessing dangerous weapons. When one of the probation officers asked Appellant whether he had any other dangerous weapons in the house, Appellant became evasive and did not respond.

Second, Appellant argues that we should reverse the district court's suppression ruling because he was not given access to probation logs that government witnesses used to refresh their memory before they testified at the

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[1] We reject Appellant's attack on the search condition's validity. The totality of the circumstances indicates that he knowingly and voluntarily agreed to that condition and waived any statutory right to a hearing and assistance of counsel before it was imposed. *See Beckwith v. United States*, 425 U.S. 341, 348 (1976). Moreover, we must also reject Appellant's collateral attack on the validity of his prior sentence. *See Custis v. United States*, 511 U.S. 485, 490-97 (1994); *United States v. Martinez-Martinez*, 295 F.3d 1041, 1044 (9th Cir. 2002).

hearing on Appellant's suppression motion. We hold that the magistrate judge did not abuse her discretion when she refused to order the production of those logs after she reviewed them *in camera*. *See United States v. Sua*, 307 F.3d 1150, 1152 (9th Cir. 2002).

Accordingly, Appellant's conviction is **AFFIRMED.**

APPENDIX B

United States District Court
Central District of California

UNITED STATES OF AMERICA	**vs.**	**Docket No. CR-**	00-01181-WJR
Defendant	Paul Richard Klein	**Social Security**	XXX-XX-XXXX (true);
[Illegible]	None	**No.**	XXX-XX-XXXX
Residence Address	725 S. Hualapal #1025, Bldg. 7 Las Vegas, Nevada 89145	**Mailing Address**	3311 E. Flamingo Road Las Vegas, NV, 89121

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date

MONTH	DAY	YEAR
03	04	2002

COUNSEL		**WITH COUNSEL**	Paul Richard Klein, pro se **(Name of Counsel)**

PLEA	X	GUILTY, and the court being satisfied that there is a factual basis for the plea.		NOLO CONTENDRE		NOT GUILTY

FINDING	There being a finding/verdict of		GUILTY, defendant has been convicted as charged of the offense(s) of:

Passing and Possessing Counterfeit Currency of the United States with intent to Defraud in violation of 18 USC 472 as charged in Count 1 of the 2-Count Indictment

JUDGMENT AND PROBATION COMMITMENT ORDER	The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to the be imprisoned for a term of:

Four (4) months

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of three years under following terms and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318;

2. The defendant shall participate for a period of 4 months in a home detention program which includes electronic monitoring and shall observe all rules of such program, as directed by the Probation Officer;

3. The defendant shall pay the costs of electronic monitoring to the contract vendor, not to exceed the sum of $4.60 for each day participation in the electronic monitoring program. The defendant

shall provide payment and proof of payment as directed by the Probation Officer; and

4. During the period of community supervision the defendant shall pay special assessment and fine in accordance with this judgment's orders pertaining to such payment.

The drug testing condition mandated by statute is suspended based on the Court's determination that the defendant poses a low risk of future substance abuse.

It is ordered that the defendant shall pay to the United States a special assessment of $100, which is due immediately.

It is ordered that the defendant shall pay to the United States a total fine of $5000.

The fine shall be paid in full immediately.

The defendant shall comply with General Order No. 01-05.

The Court grants government's motion to dismiss remaining counts, in the interest of justice.

The bond is exonerated upon payment of the fine.

Defendant waives appeal rights.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release set out on the reverse side of this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law,

may issue a warrant and revoke supervision for a violation occurring during the supervision period.

This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Correction Center.

Signed by: U.S. District Judge /s/ William J. Rea
WILLIAM J. REA

It is ordered that the Clerk deliver a certified copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

Dated/Filed 3-7-02 By /s/ Paul M. Cruz
Paul M. Cruz, Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with the additional conditions on the attached page(s) pursuant to General Orders 318 and 01-05.

Statutory Provisions Pertaining to Payment and Collection of Financial Sanctions

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to

restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3663(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;
2. Restitution, in this sequence:
   Private victims (individual and corporate),
   Providers of compensation to private victims,
   The United States as victim;
3. Fine;
4. Community restitution, pursuant to 18 U.S.C. §3663(c); and
5. Other penalties and costs.

Special Conditions for Probation and Supervised Release

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;

2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependents and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. The defendant shall notify the probation officer within 72 hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

15. the defendant shall not possess a firearm or other dangerous weapon;

16. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours.

These conditions are in addition to any other conditions imposed by this Judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____, the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

UNITED STATES MARSHAL

DATED: _____ BY:

_____

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and my legal custody.

[SEAL]

CLERK U.S. DISTRICT COURT

DATED: March 11, 2002 BY: /s/ Paul M. Cruz

Paul M. Cruz,
Deputy Clerk

APPENDIX C

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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. PAUL RICHARD KLEIN, Defendant.	No. CR 00-1181-WJR STIPULATION RE: CORRECTION OF JUDGMENT AND PROBATION/ COMMITMENT ORDER; ~~[PROPOSED]~~ ORDER (Filed May 7, 2002)

Plaintiff United States of America, by and through its counsel of record, Assistant United States Attorney Kevin S. Rosenberg, and defendant Paul Richard Klein ("defendant") proceeding pro se, hereby stipulate as follows:

1. The parties request that the Court issue a corrected judgment and probation/commitment order deleting the language "Upon release from imprisonment, the

defendant shall be placed on supervised release for a term of three years under the following terms and conditions" appearing immediately prior to the terms and conditions of supervised release and replacing it with the language "Defendant shall be placed on probation for a period of three years under the following terms and conditions."

2. On March 4, 2002, the Court held a sentencing hearing in defendant's case. The Court did not sentence defendant to imprisonment. However, the Court inadvertently stated that it sentenced defendant to three years "supervised release" with four months home detention, rather than stating that it sentenced defendant to three years probation with a special condition of four months home detention.

3. Defendant currently resides in the Las Vegas, Nevada area. In order for the probation officer in this district to transfer defendant's case to a probation officer in the District of Nevada the judgment and commitment order must accurately reflect a sentence to three years probation rather than supervised release.

IT IS SO STIPULATED.

Respectfully Submitted,

JOHN S. GORDON
United States Attorney

DATED: ~~April~~ [MAY] 6, 2002

/s/ Kevin S. Rosenberg
KEVIN S. ROSENBERG
Assistant United States Attorney

Attorneys for Plaintiff
UNITED STATES OF AMERICA

DATED: ~~April~~ [MAY] 3rd, 2002 /s/ Paul Richard Klein
PAUL RICHARD KLEIN
Attorney Pro Se

ORDER

GOOD CAUSE HAVING BEEN SHOWN, IT IS SO ORDERED.

DATED: May 7, 2002 /s/ William J. Rea
HONORABLE WILLIAM J. REA
UNITED STATES DISTRICT JUDGE

No. 06-1692

In the Supreme Court of the United States

PAUL KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Assistant Attorney General
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QUESTION PRESENTED

Whether the search of petitioner's home was reasonable under the Fourth Amendment, where petitioner was on probation; his probation was conditioned on his submitting to visits and searches by his probation officers; and, during one such visit, the officers developed a reasonable suspicion that petitioner had violated the terms of his release and was engaged in further criminal activity.

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In the Supreme Court of the United States

No. 06-1692

PAUL KLEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter* but is reprinted in 228 Fed. Appx. 787.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2007. The petition for a writ of certiorari was filed on June 19, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the District of Nevada, petitioner was convicted of possessing machine guns, in violation of 18 U.S.C. 922(*o*)(1), and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2).

He was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-3.

1. In March 2002, petitioner was convicted and sentenced in the United States District Court for the Central District of California on one count of possessing counterfeit currency. Pet. App. 5. The district court in that case did not sentence petitioner to imprisonment, C.A. E.R. 30-33, 85-86, but rather ordered that he "be placed on supervised release for a term of three years" on conditions that, *inter alia*, he (a) "participate for a period of 4 months in a home detention program," (b) "permit a probation officer to visit him * * * at any time at home or elsewhere and * * * permit confiscation of any contraband observed in plain view," and (c) "not possess a firearm or other dangerous weapon." Pet. App. 5, 11.

Petitioner moved his residence to Nevada, and in April 2002 he met with his new probation officer there. C.A. E.R. 89-90. The officer told petitioner that the Nevada probation office requires, as a condition of release, that the probationer submit to warrantless searches by probation officers to ensure compliance with all release conditions. *Ibid.*; see *id.* at 72. Petitioner agreed to the modification and signed a written waiver of his rights to a hearing and assistance of counsel on the modification. *Ibid.*

In May 2002, petitioner and the government further stipulated that the California district court had "inadvertently stated that it sentenced [petitioner] to three years 'supervised release' with four months home detention, rather than stating that it sentenced [petitioner] to three years probation with a special condition of four months home detention." Pet. App. 14. The parties

asked the court to delete from its judgment the reference to supervised release and to replace it with language sentencing petitioner "to three years probation with a special condition of four months home detention." *Ibid.* The parties further noted that petitioner had moved from the Central District of California to the District of Nevada, and that "[i]n order for the probation officer in this district to transfer [petitioner's] case to a probation officer in the District of Nevada[,] the judgment * * * must accurately reflect a sentence to three years probation rather than supervised release." *Ibid.* Soon after the parties signed the stipulation, the court issued the requested order. *Id.* at 15.

In July 2003, Nevada probation officers, without a warrant, visited petitioner at his new Nevada home and asked him for a tour of the residence. He agreed to the tour and took them into the master bedroom. There, the officers saw a large sword near petitioner's bed. The officers reminded petitioner that his release conditions prohibited him from possessing dangerous weapons, and they asked him repeatedly if he had any other weapons in the house. Petitioner did not respond to their questioning; instead, he made "furtive," "worried" glances around the room. Concerned about his mannerisms and his failure to respond, the officers opened a dresser drawer near where petitioner was standing. The drawer contained a firearm magazine loaded with ammunition. The officers detained petitioner and conducted a search of the bedroom. In different drawers, they found three firearms, including an assault rifle and a machine pistol. A subsequent search of the house, conducted pursuant to a warrant, yielded 34 additional firearms, including seven fully automatic machine guns, a sawed–off shot-

gun, and a silencer. C.A. E.R. 85, 91-93, 125-127, 193-194.

2. In May 2004, petitioner was charged in the United States District Court for the District of Nevada with possessing machine guns, in violation of 18 U.S.C. 922(*o*)(1); possessing an unlawful silencer, in violation of 26 U.S.C. 5841, 5861(d), and 5871; possessing an unregistered sawed-off shotgun, in violation of 26 U.S.C. 5841, 5861(d), and 5871; and possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1) and 924(a)(2). C.A. E.R. 1-6.

a. After he was indicted in the District of Nevada, petitioner filed in the Central District of California a motion for a writ of coram nobis or for relief pursuant to 28 U.S.C. 2255, challenging the legality of his probation. The motion argued that the California district court had lacked jurisdiction to correct his sentence of "supervised release," such that he should be permitted to withdraw his guilty plea to the 2002 counterfeiting charge. Concluding that a writ of coram nobis was unwarranted and that relief under Section 2255 was time barred, the California district court denied the motion. Supp. C.A. E.R. 1-4.

b. At the same time, petitioner moved in the District of Nevada to suppress all of the evidence that was seized as a result of the probation officers' home visit. He argued once again that the California district court had lacked jurisdiction to correct his sentence of "supervised release," and he further claimed that no search condition was ever included as part of that sentence because the Nevada probation office had "coerced" his consent to the search-condition modification. C.A E.R. 15-18.

A magistrate judge in the District of Nevada conducted an evidentiary hearing that disclosed the facts

described above. C.A. E.R. 142-269. The magistrate judge ultimately issued a report recommending denial of the motion to suppress, finding that (1) petitioner could not collaterally attack the validity of the search condition, particularly because the California district court had already denied his motion for a writ of coram nobis and for relief under Section 2255, *id.* at 96-97; (2) in any event, petitioner had knowingly and voluntarily agreed to the search-condition modification and waived his rights to counsel and a hearing, *id.* at 99-102; and (3) the probation officers' search was valid under *United States* v. *Knights*, 534 U.S. 112 (2001), because (a) upon seeing the sword in petitioner's bedroom, the officers had "probable cause to believe [petitioner] was in violation of the condition that he not possess a dangerous weapon," and (b) in light of petitioner's "furtive gestures" and refusal to answer questions, the officers had a "reasonable suspicion that [petitioner] was engaged in [further] criminal activity." C.A. E.R. 102; see *id.* at 97-99.

The district court adopted the magistrate judge's findings without qualification and denied the motion to suppress. C.A. E.R. 117. Petitioner conditionally pleaded guilty to possessing machine guns and possessing a firearm as a felon, reserving his right to appeal the Fourth Amendment issue. *Id.* at 118, 122.

3. The court of appeals affirmed. Pet. App. 1-3. At the outset (*id.* at 2 n.1), the court rejected petitioner's "collateral attack" on the California district court's correction of his sentence and on the search-condition modification. The court found no statutory authority for a collateral challenge, *ibid.* (citing *Custis* v. *United States*, 511 U.S. 485, 490-497 (1994)), and it determined that petitioner had in any event "knowingly and volun-

tarily agreed to [the search] condition and waived any statutory right to a hearing and assistance of counsel before it was imposed." *Ibid.* (citing *Beckwith* v. *United States*, 425 U.S. 341, 348 (1976)). Reasoning that petitioner was thus "subject to a valid warrantless search condition," the court concluded that the probation officers' search was consistent with the Fourth Amendment:

> [T]he probation officers who conducted the search did so based on a reasonable suspicion that [petitioner was] engaged in criminal activity. *United States* v. *Knights*, 534 U.S. 112, 121 (2001). The probation officers had reasonable suspicion that [petitioner] was violating the terms of his probation because they saw a sword in plain view next to his bed, and [petitioner] was prohibited from possessing dangerous weapons. When one of the officers asked [petitioner] whether he had any other dangerous weapons in the house, [petitioner] became evasive and did not respond.

Pet. App. 2 (internal quotation marks and ellipses omitted).

ARGUMENT

Petitioner renews his claim (Pet. 11-15) that the probation officers' search violated the Fourth Amendment because the search condition attached to his probation was invalid. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review of petitioner's fact-bound argument is not warranted. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

1. Petitioner argues that the seized evidence should have been suppressed because the search condition that was added to his probation upon his arrival in Nevada was not validly imposed. More specifically, he argues (Pet. 11-14) that the condition was not properly made part of his initial sentence of "supervised release" because the California district court lacked jurisdiction to correct that sentence beyond the seven-day window prescribed by Rule 35 of the Federal Rules of Criminal Procedure.[1]

As an initial matter, the court of appeals correctly concluded (Pet. App. 2 n.1) that petitioner could not collaterally attack the validity of the search condition through his motion to suppress. Gov't C.A. App. 1-4. This Court has made clear that, generally, "[c]hallenges to the lawfulness of confinement or to particulars affecting its duration are the province of habeas corpus." *Hill* v. *McDonough*, 126 S. Ct. 2096, 2101 (2006). A district court in California has already considered and denied petitioner's motion for the equivalent of habeas relief available to federal prisoners under Section 2255. And this Court's decisions foreclose petitioner from making a second collateral attack on his sentence through a motion to suppress in a Nevada district court. See *Daniels* v. *United States*, 532 U.S. 374, 382 (2001) ("If * * * a prior conviction used to enhance a federal sentence is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse."); *Custis* v. *United States*, 511 U.S. 485, 490-497

[1] As mentioned, petitioner argued in the courts below that the Nevada probation office had "coerced" him into agreeing to the search condition. He does not renew that argument in this Court.

(1994) (holding that petitioner had no statutory or constitutional right "to collaterally attack prior convictions" in the course of his subsequent sentencing proceeding).

Promoting the finality of judgments is a "core purpose[]" of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, generally, and of Section 2255 specifically. See *Johnson* v. *United States*, 544 U.S. 295, 309 (2005) ("[T]he United States has an interest in the finality of sentences imposed by its own courts; § 2255 is, after all, concerned directly with federal cases."). Moreover, Section 2255 promotes the efficiency of the administration of collateral attacks by requiring that a prisoner "move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. 2255. Allowing petitioner to commence a second collateral attack on his sentence in a different court after his Section 2255 motion has already failed would circumvent the procedural requirements mandated by Congress and the policies that underlie the AEDPA. Cf. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-492 (1973) (holding that allowing an inmate to attack the "constitutionality of his physical confinement itself" through a motion pursuant to 42 U.S.C. 1983, rather than a petition for habeas corpus, would undermine the policies underlying the habeas corpus remedy). Rather, in a case such as this where petitioner has already collaterally attacked his sentence and lost, "[t]he presumption of validity that attached to the prior conviction at the time of sentencing is conclusive." *Daniels*, 532 U.S. at 382.

Thus, as the case comes to this Court, the search condition must be presumed valid, particularly where both courts below found that petitioner "knowingly and voluntarily agreed to [the search] condition and waived any

* * * right to a hearing and assistance of counsel before it was imposed." Pet. App. 2 n.1; see C.A. E.R. 99-102, 117.

2. Because the condition is valid, *United States* v. *Knights*, 534 U.S. 112 (2001), is controlling. The court of appeals correctly held that, under that case, petitioner is not entitled to suppression. In *Knights*, this Court upheld the search of a home, despite the absence of a warrant or probable cause, because the target of the search was not an ordinary citizen but a probationer subject to a probation condition requiring submission to a search "at anytime." *Id.* at 114. The Court explained that "[t]he touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Id.* at 118-119 (internal quotation marks and citation omitted). The Court reasoned that because probationers have a substantially diminished expectation of privacy, and because the government has a strong "interest in apprehending violators of the criminal law," the government may "justifiably focus on probationers," who have a high rate of recidivism, "in a way that it does not on the ordinary citizen." *Id.* at 121; see *Griffin* v. *Wisconsin*, 483 U.S. 868, 880 (1987). In light of these considerations, the Court held that the search of the probationer's home—which was supported not only by the search con-

dition but by reasonable suspicion—was constitutional.[2] See *Knights*, 534 U.S. at 120-122.

The court of appeals correctly held that, under *Knights*, the search of petitioner's home in this case did not run afoul of the Fourth Amendment. The search condition attached to petitioner's probation allowed officers to search his residence at any time, and the officers at a minimum had a reasonable suspicion that petitioner was in violation of his probation. As the court of appeals recognized, a search in such a circumstance was legal under *Knights* because petitioner, as a probationer, had a diminished expectation of privacy. Pet. App. 2. Petitioner does not contend that the court of appeals misstated *Knights*'s holding or reasoning. Nor does he dispute that the probation officers searched his house pursuant to the conditions of his probation or that they had a reasonable suspicion that he was engaged in criminal activity. Instead, he seeks to distinguish *Knights* on the ground that the search condition in this case was invalid, even though every court to have considered the issue has upheld the validity of his sentence.

3. Even if the search condition had been invalid, however, petitioner would not be entitled to suppression. Wholly apart from that condition, petitioner's initial sentence of "supervised release" included a condition re-

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[2] The Court did "not decide whether the probation condition so diminished, or completely eliminated, [the probationer's] reasonable expectation of privacy * * * that a search by a law enforcement officer without *any* individualized suspicion would have satisfied the reasonableness requirement of the Fourth Amendment." *Knights*, 534 U.S. at 120 n.6 (emphasis added). In *Samson* v. *California*, 126 S. Ct. 2193 (2006), the Court "answer[ed] * * * in the affirmative" a "variation of the question this Court left open in * * * *Knights*," holding that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." *Id.* at 2196 & n.1, 2202.

quiring him to "permit a probation officer to visit him * * * at any time at home or elsewhere" and to "permit confiscation of any contraband observed in plain view." Pet. App. 9, 11. Petitioner did not challenge that condition in his motion to suppress.[3] Under that condition, the probation officers were lawfully present in petitioner's home when they saw the sword and discerned the furtive behavior that gave rise to their reasonable suspicion. The subsequent search was therefore valid under the *Knights* totality-of-the-circumstances approach even if the officers' actions were justified at the outset only by the visitation condition. In addition, the search of the drawers in petitioner's room was valid as a search incident to his arrest for violation of his probation conditions (*i.e.*, by possessing the sword). See *Rawlings* v. *Kentucky*, 448 U.S. 98, 109 (1980); Gov't C.A. Br. 16-18.[4]

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[3] Although petitioner now contends (Pet. 12-13) that "[t]he sentence of supervised release was in and of itself an illegal sentence," such that *any* warrantless search conducted pursuant to any condition thereof "was unlawful," he did not make that argument in his motion to suppress. C.A. E.R. 11-18. To the contrary, he cited *United States* v. *Penna*, 319 F.3d 509 (9th Cir. 2003), for the proposition that "the sentence imposed by the court" in March 2002 "is the only enforceable sentence against [petitioner]," such that the term of "supervised release" had to be "reinstate[d]." C.A. E.R. 16 (internal quotation and citation omitted). It is not surprising, then, that the court of appeals did not address the issue. Pet. App. 1-3. There is no reason for this Court to depart in this instance from its usual practice of declining to entertain a claim that was neither properly preserved nor passed upon below, see, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977), especially because the validity *vel non* of petitioner's initial sentence presents no issue of enduring legal significance.

[4] Even if the initial search had not been legal, the evidence still would have been admissible under an exception to the exclusionary rule because it "ultimately or inevitably would have been discovered by

4. Contrary to petitioner's contention (Pet. 11, 14-15), nothing in the decision below remotely conflicts with the Second Circuit's decision in *United States* v. *Thomas*, 135 F.3d 873 (1998). *Thomas* did not address the legality of a probationary search, and so it had no occasion to discuss the Fourth Amendment, let alone this Court's decision in *Knights*. Rather, *Thomas* merely held that the district court had erred in (a) imposing a sentence of supervised release without also imposing an initial period of imprisonment, and (b) attempting to correct that error after the seven-day window prescribed by Federal Rule of Criminal Procedure 35. *Id.* at 875. That holding does not assist petitioner's motion to suppress. *Thomas* vacated the sentence at issue on *direct review*; it did not hold that a defendant like petitioner could collaterally attack a condition of a prior sentence, or a modification of that sentence, in a motion to suppress evidence. And even if *Thomas* could somehow be construed to permit a collateral attack—and its holding thus allowed petitioner to challenge the search condition in this case—petitioner's motion to suppress would fail in any event. As discussed, petitioner's very status as a probationer, along with the visitation condition to which he was subject, made the officers' reasonable suspicion sufficient to support the search. The search was also valid as a search incident to a lawful arrest. And even if the search were invalid, the exclusionary rule would be inapplicable to this case. See note 4, *supra*.

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lawful means." *Nix* v. *Williams*, 467 U.S. 431, 444 (1984). Here, the officers would have discovered the guns during their execution of the search warrant, which was supported by probable cause to believe that petitioner was in violation of his probation as evidenced by the sword in plain view and petitioner's evasive behavior.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Solicitor General
ALICE S. FISHER
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STEPHAN E. OESTREICHER, JR.
Attorney

SEPTEMBER 2007

AMER
RECORDS
AND
BRIEFS

(3)

No. 06-1692

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

82

PAUL KLEIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Ninth Circuit Court Of Appeals

REPLY BRIEF FOR PAUL KLEIN, PETITIONER

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Griffin v. Wisconsin, 438 U.S. 868 (1987) 2

Rawlings v. Kentucky, 448 U.S. 109 (1980) 7

United States v. Knight, 534 U.S. 112 (2001) 3, 8

United States v. Martinez-Martinez, 295 F.3d 1041 (9th Cir. 2002) 1

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ARGUMENT

A. THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ERRED IN UPHOLDING THE WARRANTLESS SEARCH THAT WAS PERFORMED PURSUANT TO A CONDITION OF KLEIN'S ILLEGAL AND VOID SENTENCE

I. PETITIONER IS NOT COLLATERALLY ATTACKING HIS CALIFORNIA CONVICTION

The United States Court of Appeals for the Ninth Circuit upheld the search in this case which was performed as a result of Klein's illegal and void sentence. The Ninth Circuit relied upon the holding in *Custis v. United States*, 511 U.S. 485, 490-97 (1994) and *United States v. Martinez-Martinez*, 295 F.3d 1041, 1044 (9th Cir. 2002) and viewed Klein's motion as a collateral attack on his California conviction. Similarly, the Respondent cites *Custis*, supra, and *Daniels v. United States*, 532 U.S. 374, 382 (2001). All three cases are factually and legally distinguishable from this case. Those cases address the impropriety of collateral attacks on prior convictions that are being utilized for sentencing enhancements. To the contrary, the instant case deals with the fact that Klein's prior conviction could not be utilized as the basis or justification for the illegal and warrantless search performed by the government agents.

Petitioner is litigating the propriety of a search and not the propriety of his California conviction. Had the district court herein agreed that the search was a violation of the Fourth Amendment, because Petitioner was not properly on supervision at the time of the search, the Court would not be entering an order invalidating Klein's prior conviction, it would be entering an order suppressing the evidence.

II. THE PROBATION OFFICER DID NOT HAVE AUTHORITY TO SEARCH PETITIONER'S HOME

The Respondent argues that individuals under the supervision of probation officers have a diminished expectation of privacy and that probation officers need only reasonable suspicion to search a probationer's home. Res. p. 9. The government relies on *Griffin v. Wisconsin*, 438 U.S. 868, 874 (1987) for that notion. However, *Griffin* involved an analysis of the State of Wisconsin's probation system, wherein the Court held that the state probation system presented a special need for the exercise of supervision to assure that probation restrictions are in fact observed. Therein, this Honorable Court specifically analyzed a Wisconsin regulation that provided authority for probation officers to search under a reasonable suspicion standard. In fact this Honorable Court specifically stated that:

> "We think the Wisconsin Supreme Court correctly concluded that this warrantless search did not violate the Fourth Amendment. To

> reach that result, however, we find it unnecessary to embrace a new principle of law, as the Wisconsin court evidently did, that any search of a probationer's home by a probation officer satisfies the Fourth Amendment as long as the information possessed by the officer satisfies a federal "reasonable grounds" standard. As his sentence for the commission of a crime, Griffin was committed to the legal custody of the Wisconsin State Department of Health and Social Services, and thereby made subject to that Department's rules and regulations."

The government also cites *United States v. Knight*, 534 U.S. 112 (2001). Res. p. 9. Therein, this Honorable Court held that when a probationer has a *valid* search clause as a condition of probation, he is not held to the standard of probable cause required under the Fourth Amendment for a search.

Accordingly, that case has no bearing herein, as the search clause was invalid.

Additionally, even under a standard of reasonableness, the officers cannot justify randomly opening drawers that are four to five feet away from Petitioner, based upon their observation of a ceremonial sword in his bedroom.

The government contends that when the probation officers observed the sword in Petitioner's room they had probable cause to believe Petitioner had violated his conditions of supervision. Res. p. 3. They further claim that when "Petitioner furtively looked

around the room as if to see if any other weapons were visible" that gave the officers reasonable suspicion that there might be other weapons. Res. p. 3. The government is both factually and legally incorrect.

Officer Perez testified that when he entered Petitioner's room he saw a sword against the wall between the bed and the nightstand. The officer advised Petitioner that he was not supposed to have any dangerous weapons. The officer secured the sword. The officer asked Petitioner to show him the closet. The officer did not discover anything improper within the closet. At that time the two officers and Mr. Klein were all standing within the bedroom. Officer Perez asked Petitioner if he had any other weapons, and he started looking around and did not respond. Although Klein made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms."

The above described circumstances did not give rise to reasonable suspicion.

The Respondent then erroneously asserts that "even if the search condition had been invalid, however, petitioner would not be entitled to suppression." Res. p. 10. The Respondent bases that assertion on the notion that Petitioner's original sentence of "supervised release" included a condition requiring him to "permit a probation officer to visit him at any time . . . to permit confiscation of any contraband observed in plain view." Res. p. 10-11.

What the Respondent fails to recognize is that the proceedings related to Petitioner's "supervised release" were void. The original sentence of "supervised release" was illegal and the modification was without jurisdiction.[1] Moreover, the officers did not arrest Klein as a result of the sword and therefore had no authority to search further.

III. THE SEARCH OF PETITIONER'S ROOM WAS NOT A SEARCH INCIDENT TO ARREST

Contrary to the government's assertion, Petitioner was not arrested as a result of the sword. Officer Perez testified that he saw the sword and secured it. He did not handcuff Petitioner, he did not advise Petitioner of his rights under *Miranda*, and he did not indicate to Petitioner that we was under arrest. (Officer Fredlund confirmed these facts). In fact, Petitioner was asked to show the officers his

[1] The Respondent erroneously claims that even if the "corrected" sentence of probation was invalid, the original sentence of Supervised Release would permit the officers to be present at Petitioner's home when they encountered the sword and they are permitted to confiscate evidence found in plain view. Res. p. 11. What the Respondent fails to recognize is that in *United States v. Thomas*, 135 F.3d 873 (1998), when the Defendant faced a probation revocation and brought to the Court's attention that the sentence was illegally modified, the Court did not revert back to the original sentence and violate the Defendant. Rather, the Court determined that the probation was illegally imposed and therefore no violation could have occurred.

closet and was asked un-*Mirandized* questions after the seizure of the sword.

Thereafter, although Petitioner made no movement or gestures, Perez then reached to his immediate left "where there was a dresser, and I pulled open a random drawer because of his mannerisms." The dresser had several drawers; however, only one was opened at that time. The drawer was approximately four feet away from Petitioner. The officer described the drawer as a "junk drawer." This officer testified that officer Fredlund then opened a drawer to the dresser that was directly by him. Again, that dresser had several drawers and only one was opened at that time. That officer found a loaded gun magazine.

Petitioner was then escorted out of the room and officer Fredlund watched Petitioner. Petitioner was still not under arrest, nor were restraints placed on him. Perez then went back into the bedroom and "conducted a limited search of the area." Petitioner was not in the bedroom at that time. The officer found three different weapons. The weapons were located underneath the bed. Petitioner was *then* placed in restraints.

The government misplaces their focus. The government argues that after the officers opened the drawers and found the gun magazine, Petitioner was escorted out of the room and thereafter a search incident to arrest occurred. What the government fails to recognize is that the search of the drawers and the discovery of the gun magazine is what precipitated

the subsequent search of the bedroom. Accordingly, the first search of the drawers was illegal and cannot be justified as a search incident to arrest, as Petitioner was not being arrested.

The government's reliance upon *Rawlings v. Kentucky*, 448 U.S. 109 (1980) is also misplaced. Therein, the Defendant admitted to being the owner of the large quantity of drugs that the officers seized. The officers then searched the individual and arrested him. This Honorable Court held that the formal arrest followed quickly on the heels of the challenged search and therefore was lawful. *Id.* at 110. The distinction there is that the Defendant was going to be arrested no matter what. They searched him and immediately arrested him. In the instant case, the Petitioner was not going to be arrested. The officers secured the sword, and asked him to show them around the rest of the room, including the closet. Clearly, Petitioner was not under arrest, nor did the officers even imply in their testimony that he would have been arrested. The sole basis for Petitioner's arrest were the weapons found after the officers searched the room. This search was not contemporaneous with the arrest.

Finally, the respondent claims that if this Honorable Court excises the illegally obtained evidence from the search warrant application and only considers the loaded magazine and ammunition, there would still be probable cause. Res. p. 11 fn. 4. The government makes this claim on the premise that the magazine and ammunition were found in a lawful

search incident to arrest. As described above, those items were not found in a valid search incident to arrest.

IV. *UNITED STATES V. THOMAS* IS DIRECTLY APPLICABLE TO THIS CASE

The Respondent ignores the import of *United States v. Thomas*, 135 F.3d 873 (1998) by again relying upon *Knight*, supra. The government fails to recognize that the holding in *Thomas* is not limited to direct challenges of prior convictions. Rather, the Court in *Thomas* provided a detailed analysis of the impropriety of a Court changing a sentence of "supervised release" to one of probation, beyond seven days after the judgment is entered.

CONCLUSION

1. Petitioner's Sentence from the Central District of California was an illegal sentence. Thereafter, the "correction" was entered beyond the authority of the Court. Accordingly, Petitioner was neither on Probation or Supervised Release at the time of the search by Officers Perez and Fredlund;

2. The officers did not search Petitioner's room incident to arrest. A search incident to arrest must occur contemporaneously to the arrest and must be the result of an impending arrest. In the instant case the testimony is clear that Petitioner was not under arrest as a result of the sword, he was not *Mirandized*, and he was not placed in

restraints. It was not until the guns were found as a result of the illegal search that Petitioner was arrested;

The Petitioner's home was illegally searched as a result of a void and illegal sentence. Had Petitioner's case been pending within the United States Court of Appeals for the Second Circuit, the evidence would have been suppressed. Accordingly, there is a split in the Circuits and Certiorari is warranted herein.

Dated this 13th day of September, 2007.

Respectfully submitted,

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